TELEKOM MALAYSIA BHD v. SWIS RESOURCES SDN BHD

HIGH COURT MALAYA, SHAH ALAM
CHOONG YEOW CHOY JC
[CIVIL APPEAL NO: BA-12BNCvC-17-04-2024]
25 OCTOBER 2024

Abstract – *Orders and directions given by the court during a pre-trial case management are peremptory in nature. Order 34 r. 2(3) of the Rules of Court 2012 ('ROC') confers upon the court the power to, inter alia, strike out a claim, at its own motion, in the event of non-compliance by any party with O. 34 r. 2(2) of the ROC. Therefore, the absence of an unless order, warnings, 'second chance' and formal application by any opposing party to strike out the claim, will not circumvent the court's judicial discretion to strike out the claim.*

CIVIL PROCEDURE: *Case management – Directions made by trial judge during pre-trial case management – Non-compliance – Failure by party to file witness statements and list of witnesses within prescribed time – Sessions Court Judge ('SCJ') ordered claim of party be struck out due to non-compliance ('order') – Whether order ought to be set aside and claim be reinstated to Sessions Court for hearing before another judge – Whether there was non-compliance by party when order was made – Whether absence of unless order, warnings, second chance and formal application by opposing party to strike out claim circumvent judicial discretion of SCJ to strike out claim – Whether judicial discretion of SCJ exercised appropriately – Rules of Court 2012, O. 34 r. 2(2)(l), (m) & (3)*

The appellant was a telecommunication company, while the respondent was a construction company. In 2022, due to an allegation that the respondent had damaged the appellant's cable during its excavation works, the appellant filed a claim against the respondent at the Shah Alam Sessions Court ('claim'). The said claim was subsequently transferred to the Sepang Sessions Court. On 5 January 2024, during a case management session *via* e-Review, the Sessions Court Judge ('SCJ') directed the parties to file their respective witness statements and list of witnesses ('documents') 'on or before' 26 March 2024 ('pre-trial case management directions'). However, at 8:55am on the said date, rather than filing the said documents, the appellant instead requested an extension of time for the filing of the same. According to the appellant, they were having difficulty in contacting and locating a key witness who had retired. Further, at 9:41am on the same date, the appellant filed another request to the SCJ, this time, for the SCJ to proceed with fixing the trial dates for the claim. The SCJ had not responded to both requests. Thereafter, at 6:04pm on the same date, the SCJ made an order under O. 34 r. 2(3) of the Rules of Court 2012 ('ROC') to strike out the claim on the

ground that there was a failure by the appellant to comply with O. 34 r. 2(2)(l) and (m) of the ROC ('order'). This was an appeal by the appellant against the said order, to set aside the same and for the claim to be reinstated to the Sepang Sessions Court to be heard before a different judge. Among the issues raised in this appeal were: (i) whether there was non-compliance by the appellant with the pre-trial case management directions when the SCJ made the order; (ii) whether the absence of an unless order, warnings and 'second chance' circumvent the SCJ's ability to exercise his discretion under O. 34 r. 2(3) of the ROC; (iii) whether the absence of an application for dismissal by the respondent circumvent the SJC's ability to exercise his discretion under O. 34 r. 2(3) of the ROC; and (iv) whether it was appropriate for the SCJ to exercise his discretion under O. 34 r. 2(3) of the ROC to dismiss the claim based on the circumstances of the claim.

Held (allowing appeal; ordering claim to be reinstated to Sepang Sessions Court for hearing before another judge):

(1) The pre-trial case management directions were for the appellant to file the documents 'on or before' 26 March 2024. The SCJ's judicial discretion under O. 34 r. 2(3) of the ROC would only be available on 27 March 2024. The order was made by the SCJ at 6:04pm on 26 March 2024. Hence, at the time the said order was made, the appellant arguably had not defaulted in complying with the pre-trial case management directions. This also entailed that the judicial discretion of the SCJ under O. 34 r. 2(3) of the ROC, at that material time, was still unavailable. This strongly supported the appellant's appeal. (paras 37-39)

(2) As acknowledged in *Koh Heng Jin v. Gan Kooi Ann*, orders and directions issued by the court during pre-trial case management are peremptory in nature as O. 34 r. 2(3) of the ROC confers on the court the power to, *inter alia*, strike out a party's claim either on its own motion or upon the application of any party, in the event that such party defaults in complying with any order and/or directive issued by the court under the said O. 34 r. 2(2) of the ROC. The absence of an unless order itself would not circumvent the court's ability to make an order to strike out a party's claim under O. 34 r. 2(3) of the ROC for non-compliance with pre-trial case management directions under O. 34 r. 2(2)(l) and (m) of the ROC. Similarly, the argument that the absence of a peremptory order should be able to restrain a court from exercising its discretion under O. 34 r. 2(3) of the ROC was unmeritorious. The same was applicable to the argument regarding the absence of warnings and 'second chance'. (paras 41-42 & 45-46)

(3) The appellant argued that the SCJ could not exercise his judicial discretion under O. 34 r. 2(3) of the ROC because the respondent had not formally applied under O. 34 r. 2(3) of the ROC to strike out the

appellant's claim. This argument was rejected because O. 34 r. 2(3) explicitly stipulates that a court can exercise such discretion at its own motion. (paras 47 & 48)

(4) The reason provided by the appellant, regarding the difficulty in contacting the witness because the same had retired, for the non-compliance, was likely a valid and acceptable reason. The delay therefore could not be 'construed as amounting to total disregard of directions that affected the conduct of the trial or derailed the trial'. Furthermore, the decision to allow this appeal was reinforced by the findings that this was a first non-compliance by the appellant. Other than that, the appellant had rightly highlighted that the court should take into consideration that the merits of the claim had not been heard by the SCJ. This court was mindful of the courts' 'objective' or aspiration that disputes should naturally be disposed on the merits. For these reasons, issue (iv) was answered in the negative. The appeal was thus allowed, and the claim was ordered to be reinstated to the Sepang Sessions Court for hearing before another judge. (paras 56, 57, 59 & 66-67)

Case(s) referred to:

Dr Sim Kui Hian v. Chong Chieng Jen & Other Appeals [2021] 6 CLJ 305 CA ***(refd)***

Faisal Hj Siraj & Anor v. Ahmad Zaki Sdn Bhd & Ors [2020] CLJU 105; [2020] 1 LNS 105 ***(refd)***

Hatara (M) Sdn Bhd v. Petroliam Nasional Bhd & Anor [2010] 3 CLJ 550 CA ***(refd)***

Ho Woon Kong & Ors v. Potensi Mestika Construction Sdn Bhd & Anor [2024] CLJU 338 HC ***(dist)***

How Hock Sing v. Lee Say Peng & Ors [2015] 9 CLJ 368 HC ***(refd)***

Ineax Engineering Sdn Bhd v. Ineax Process Sdn Bhd & Anor [2017] CLJU 665; [2017] 1 LNS 665 HC ***(refd)***

Koh Heng Jin v. Gan Kooi Ann [2015] CLJU 1244; [2015] 1 LNS 1244 CA ***(refd)***

Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd [2004] 3 CLJ 88 CA ***(refd)***

Muhammad Ammar Haron v. Sharifah Zahidah Syed Nooh & Ors [2025] 2 CLJ 466 HC ***(refd)***

Ri-Yaz Hotels & Resorts Sdn Bhd v. Dynamics Capital Sdn Bhd [2022] CLJU 2610; [2022] 1 LNS 2610 HC ***(refd)***

Sunway PMI-Pile Construction Sdn Bhd v. Pembenaan Chan & Chua Sdn Bhd [2003] 5 CLJ 63 HC ***(refd)***

Tan Sri Datuk Diong Hiew King v. Lau Swee Nguong [2012] CLJU 1086 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 34 rr. 1, 2, 2(2)(l), (m), (3)

Rules of the High Court 1980, O. 34

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For the respondent - Mohd Faiz Iskandar Hamzah & Shamshaira Fazwani Shamsul Ridzuan; M/s Arief & Iskandar

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JUDGMENT

Choong Yeow Choy JC:

Introduction

B **[1]** Modern case management techniques require courts to play an active role in overseeing the civil litigation process. A key aspect of this management involves issuing pre-trial case management directions to the parties involved. Adhering to these directions is crucial for ensuring that disputes are resolved justly, promptly, and cost-effectively.

C **[2]** The current case concerns a party's failure to adhere to pre-trial case management directions issued by the trial court. This non-compliance raises the issue of whether the party should face the full consequences for the violation or if leniency should be considered.

D **[3]** The appeal before this court pertains to the appellant's appeal against the learned Sepang Sessions Court Judge's decision to strike out its claim under O. 34 r. 2(3) of the Rules of Court 2012 for non-compliance with the pre-trial case management direction issued on 5 January 2024 – to file its witness statements and list of witnesses by 26 March 2024 – that is, non-compliance with O. 34 r. 2(2)(l) and (m) of the Rules of Court 2012.

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The Principal Issues

[4] The primary issues for determination in this appeal are as follows:

(i) whether there was non-compliance with the pre-trial case management directions when the learned Sessions Court Judge dismissed the appellant's claim under O. 34 r. 2(3) of the Rules of Court 2012?

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(ii) whether the absence of an unless order circumvents the learned Sessions Court Judge's ability to exercise his discretion under O. 34 r. 2(3) of the Rules of Court 2012?

(iii) whether the absence of an application for dismissal by the respondent circumvents the learned Sessions Court Judge's ability to exercise his discretion under O. 34 r. 2(3) of the Rules of Court 2012?; and

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(iv) whether it was appropriate for the learned Sessions Court Judge to exercise his discretion under O. 34 r. 2(3) of the Rules of Court 2012 to dismiss the appellant's claim based on the circumstances in that case?

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Background Facts

[5] On 23 September 2022, the appellant filed a claim against the respondent in the Shah Alam Sessions Court, alleging that the respondent's excavation works had damaged the appellant's cable.

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[6] Post-pleadings, both parties have filed the following documents:

(i) summary of the plaintiff's case (28 February 2023);

(ii) bundle of pleadings (28 February 2023);

(iii) statement of agreed facts (28 February 2023);

(iv) common bundle of documents (28 February 2023);

(v) summary of the defendant's case (7 March 2023); and

(vi) defendant's list of witnesses (7 March 2023).

[7] Fast forward to 3 October 2023, the Shah Alam Sessions Court transferred the suit to the Sepang Sessions Court; the relevant order was issued on 28 November 2023.

[8] On 5 January, 2024, during the case management session *via* e-Review, the Sepang Sessions Court directed the appellant to file its witness statements and list of witnesses and the respondent to file the respondent's witness statements - 'On Or Before' 26 March 2024.

[9] However, on 26 March 2024, although the respondent had filed its witness statements, the appellant did not file its witness statements and list of witnesses. The appellants, at 8.55am, sought an extension of time from the Sepang Sessions Court *via* e-Review. The appellant explained that the reason for the non-compliance with the pre-trial case management directions was because it had difficulty in contacting and locating a key witness who had retired. Further, at 9.41am, the appellant had requested the learned Sessions Court Judge to proceed with fixing the trial dates first. The learned Sessions Court Judge did not respond to both requests.

[10] Later the same day, at 6.04pm, the learned Sessions Court Judge in the e-Review system made an order under O. 34 r. 2(3) of the Rules of Court 2012 to strike out the appellant's claim due to the latter's non-compliance with O. 34 r. 2(2)(l) and (m) of the Rules of Court 2012.

[11] The following are the learned Sessions Court Judge's grounds of judgment:

(i) the plaintiff's claim was registered since 2022, yet the plaintiff did not file its witness statements and witness list;

(ii) although one witness could not be located, the Sessions Court Judge questioned the plaintiff whether the other plaintiff's witness could be located;

(iii) a period of three months provided in the previous case management was sufficient for the plaintiff to at least file the plaintiff's witness list and other witness statements;

A (iv) the Sessions Court Judge could have considered an extension of time had he found that there were positive efforts made by the plaintiff to comply with O. 34 r. 2(2)(l) and (m) of the Rules of Court 2012; and

(v) the lack of positive effort by the Plaintiff to comply with O. 34 r. 2(2) (l) and (m) Rules of Court 2012 warrants a striking out under O. 34 B r. 2(3) of the Rules of Court 2012.

[12] As a result of the order made by the learned Sessions Court, the appellant therefore made an application to appeal on 3 April, 2024 to set aside the said order and to reinstate the case back to the Sepang Sessions C Court before a different Sessions Court Judge.

The Parties' Contentions

[13] Given the severe implications of this appeal, the parties had argued extensively on the issues in dispute. The parties' position and contention were as follows.

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The Appellant's Position And Contentions:

[14] The appellant underscored the point that the order by the Sessions Court was made in the absence of an unless order, peremptory order, warning and second chance.

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[15] The appellant also stressed that even though the respondent had objected, it nevertheless did not make an application under O. 34 r. 2(3) of the Rules of Court 2012 for the appellant's claim to be dismissed. Hence, the appellant averred that learned Sessions Court Judge should not have made the said order.

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[16] It was also contended by the appellant that the learned Sessions Court Judge had not considered the merits of its claim before making the said order.

[17] The appellant also averred that the non-compliance was minor, as all documents, except for the witness statements and the witness list, had been G filed. According to the appellant, it merely needed a short extension of time to finalise and to file the said documents.

[18] The appellant further highlighted the fact that the non-compliance in question was the first non-compliance, there was an absence of a history of non-compliance by the appellant. The appellant attributed this H non-compliance to its inability to locate and contact a key witness who had since retired.

[19] Since trial dates for this action have not been fixed, the appellant stressed that any delay caused was minimal.

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[20] Last but not least, the appellant argued that it should have been penalised in costs instead of the drastic measure of having its claim struck out. The exercise of the discretion by the learned Sessions Court to strike out the appellant's claim in the instant case, argued the appellant, was "unreasonable, unfair, prejudicial", had caused "miscarriage of justice", and had affected the appellant's "right to a fair trial". A B

The Respondent's Position And Contentions

[21] First, it was the respondent's argument that the pre-trial case management directions made on 5 January, 2024 were preemptory in nature.

[22] The respondent also contended that the Sessions Court possesses the power to dismiss the action on its own motion. C

[23] Third, it was the respondent's submission that the appellant was afforded ample time to comply with the pre-trial case management directions as the case has been registered since 2022, and from the date of directions (5 January 2024) it had three months to comply with the said directions. D

[24] The respondent disagreed with the appellant and averred instead that the latter's non-compliance created unnecessary delays in proceedings, contrary to the objectives of O. 34 r. 2 of the Rules of Court 2012;

[25] Fifth, the respondent asserted that the appellant's request for extension was made at the last minute, that is, on the day of the case management on 26 March 2024 and the appellant could not provide valid reasons or justifications for the non-compliance. It was thus argued that the appellant's explanation was a mere afterthought. E

[26] Once again, as a reply to the appellant's submission, the respondent argued that although the learned Sessions Court Judge had yet to fix the trial dates, the respondent had already made necessary preparations, which was then undermined by the appellant's non-compliance with the pre-trial case management directions. F

[27] As the respondent was prejudiced by the appellant's non-compliance of the said directions, the respondent submitted that the learned Sessions Court Judge was right in exercising his discretion to strike out the appellant's claim under O. 34 r. 2(3) of the Rules of Court 2012. G

The Law And The Relevant Legal Principles Relating To Order 34 Rules 2(2) And (3) Of The Rules Of Court 2012 H

[28] This court in its recent decision in *Muhammad Ammar Haron v. Sharifah Zahidah Syed Nooh & Ors* [2025] 2 CLJ 466 ("*Muhammad Ammar*") had examined the law on O. 34 r. 2 of the Rules of Court 2012 in detail. For ease of reference, this court will once again briefly reiterate the law on O. 34 r. 2 of the Rules of Court 2012. I

[29] The court's power to issue pre-trial case management directions pertaining to the filing of witness statements and list of witnesses can be found in O. 34 r. 2(2)(l) and (m) which expressly provide that:

> (2) At a pre-trial case management, the court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including ...
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> (l) the period within which the parties have to exchange and file their list of witnesses;
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> (m) the period within which the parties have to exchange and file witness statements of all witnesses who may give evidence at the trial;

[30] The court's discretionary power to strike out a party's claim for non-conformity with pre-trial case management directions are explicitly stated in O. 34 r. 2(3) of the Rules of Court 2012. It reads as follows:

> The court, having given directions under rule 2(2) or rule 3 may either on its own motion or upon the application of any party, if any party defaults in complying with any such directions, dismiss such action or proceedings or strike out the defence or counterclaim or enter judgment or make such order as it thinks fit.

[31] The *raison d'etre* of O. 34 r. 2(3) of the Rules of Court 2012 can be gleaned from r. 2(2), which states that pre-trial case management is "... to secure the just, expeditious and economical disposal of the action or proceedings ...".

[32] The courts have on many occasions explained and highlighted the judicial discretionary power under O. 34 r. 2(3) of the Rules of Court 2012.

[33] For instance, the Court of Appeal in *Koh Heng Jin v. Gan Kooi Ann* [2015] CLJU 1244; [2015] 1 LNS 1244; [2016] AMEJ 0039; [2015] MLJU 2242; [2015] MLRAU 403 ("*Koh Heng Jin*") explained that:

> [40] In our view even though the learned judge did not issue an "unless order", O. 34 r. 2(2) of the ROC (not O. 34 r. 1 as cited by counsel) clearly contemplates that orders and directions issued by the court during pre-trial case management are peremptory in nature as O. 34 r. (3) of the ROC confers on the court the power to, *inter alia*, strike out a party's claim either on its own motion or upon the application of any party, in the event that such party defaults in complying with any order and/or directive issued by the court under the said O. 34 r. 2(2).

[34] Likewise, the High Court in *Tan Sri Datuk Diong Hiew King v. Lau Swee Nguong* [2012] CLJU 1086; [2014] 8 MLJ 575; [2012] MLRHU 1785 ("*Tan Sri Datuk Diong Hiew King*") held that:

> [48] Rule 2 of the Order deals with pre-trial case management which is directed by the court. It encompasses a very wide range of matters which the court can consider including the appropriate orders and directions that should be made by the court to secure the just, expeditious and economical disposal of the action or proceedings. ...

[35] More factually pertinent to the present case, the High Court in *Ri-Yaz Hotels and Resorts Sdn Bhd v. Dynamics Capital Sdn Bhd* [2022] CLJU 2610; [2022] 1 LNS 2610; [2023] 1 AMR 142; [2022] MLJU 2762; [2022] MLRHU 2319 stressed on the availability of this discretion in the context of a party's non-compliance with pre-trial case management directions to file witness statements:

> [23] ... it is clear that Order 34 rule 2(3) of ROC 2012 provides a discretionary power to the court, *inter alia*, to strike out the defence and counterclaim and to enter judgment if the Defendant has defaulted in complying with any directions given by the court under Order 34 rule 2(2) of ROC 2012 which includes for the parties to exchange and file witness statements of all witnesses who may give evidence at the trial.

[36] Even prior to the introduction of the Rules of Court 2012, the courts had nevertheless wielded the discretion to strike out a party's claim for non-conformity with pre-trial case management directions under the repealed O. 34 of the Rules of High Court 1980 (see *Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88; [2004] 4 AMR 449; [2004] 4 MLJ 446; [2004] 1 MLRA 702; *Sunway PMI-Pile Construction Sdn Bhd v. Pembenaan Chan & Chua Sdn Bhd* [2003] 5 CLJ 63; [2001] AMEJ 0281; [2002] 7 MLJ 538; [2001] 5 MLRH 665; *Tan Sri Datuk Diong Hiew King*).

Application Of The Principles To The Present Appeal

Issue 1: Whether There Was Non-compliance With The Pre-trial Case Management Directions When The Learned Sessions Court Judge Dismissed The Appellant's Claim Under Order 34 Rule 2(3) Of The Rules Of Court 2012?

[37] It is not disputed that the pre-trial case management directions by the Sessions Court were for the appellant's witness statements and list of witnesses to be filed 'On Or Before' 26 March 2024. This is significant because it would mean that a non-compliance can only occur, and in effect, the learned Sessions Court Judge's judicial discretion under O. 34 r. 2(3) of the Rules of Court 2012 will only be available on 27 March 2024.

[38] In this case, the learned Sessions Court Judge made the order to strike out the appellant's claim under O. 34 r. 2(3) of the Rules of Court 2012 at 6.04pm on 26 March 2024. Therefore, when the said order was made, the appellant arguably had not defaulted in complying with the pre-trial case management directions and importantly, entailing that the judicial discretion under O. 34 r. 2(3) of the Rules of Court 2012 was still unavailable to the learned Sessions Court Judge.

[39] Notwithstanding the appellant's position and that it had not raised this point in its submissions, this court finds that this finding strongly supports the appellant's appeal as when the order was made there was no default *per se* and the learned Sessions Court Judge's judicial discretion under O. 34 r. 2(3) of the Rules of Court 2012 was still unavailable at that time.

Issue 2: Whether The Absence Of An Unless Order Circumvents The Learned Sessions Court Judge's Ability To Exercise His Discretion Under Order 34 Rule 2(3) Of The Rules of Court 2012?

[40] The appellant had persistently highlighted that the learned Sessions Court Judge's order to strike out its claim under O. 34 r. 2(3) of the Rules of Court 2012 was made in the absence of an unless order, preemptory order, warning or a 'second chance'.

Unless Order

[41] On the unless order point, this court in *Muhammad Ammar* emphasised that an absence of an unless order itself does not circumvent the courts' ability to make an order to strike out a party's claim under O. 34 r. 2(3) of the Rules of Court 2012 for non-compliance with pre-trial case management directions.

[42] For example, the Court of Appeal in *Koh Heng Jin* held that:

> [40] In our view even though the learned judge did not issue an "unless order", O. 34 r. 2(2) of the ROC ... clearly contemplates that orders and directions issued by the court during pre-trial case management are peremptory in nature as O. 34 r. (3) of the ROC confers on the court the power to, *inter alia*, strike out a party's claim either on its own motion or upon the application of any party, in the event that such party defaults in complying with any order and/or directive issued by the court under the said O. 34 r. 2(2).

[43] As explained by Mohd Nazlan JC in *How Hock Sing v. Lee Say Peng & Ors* [2015] 9 CLJ 368; [2015] 6 AMR 381; [2015] MLJU 712; [2015] MLRHU 856 ("*How Hock Sing*"), an unless order "is an order of the court that directs a party to perform some process requirement by a specified date and states the consequences of transgression". His Lordship in another case, *Ineax Engineering Sdn Bhd v. Ineax Process Sdn Bhd & Anor* [2017] CLJU 665; [2017] 1 LNS 665; [2017] AMEJ 0478; [2017] MLJU 543; [2017] MLRHU 380 explained as follows:

> [26] At any rate, what is important to note is that under Order 34, the powers of the court to dismiss an action are not confined to situations where an 'unless order' has been made and not complied with.

[44] Likewise, when considering whether to exercise its discretion under O. 34 r. 2(3) of the Rules of Court 2012, the High Court held that:

> [10] And I do not think that such discretion can be exercised only if I had made an unless order as the provision does not say so and I do not think I should read the words "unless order" into the said sub-rule.

Peremptory Order

[45] Similar to the unless order point, the argument that an absence of a peremptory order should be able to restrain a court from exercising its discretion under O. 34 r. 2(3) of the Rules of Court 2012 is unmeritorious. As acknowledged by *Koh Heng Jin*, pre-trial case management directions are peremptory in nature:

> [35] ... Although the court did not issue an "unless order" as such, the direction issued by the learned judge was pre-emptory in nature in that it was implicit therein that the direction must be complied with before the next case management date ...
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> ...
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> [40] In our view even though the learned judge did not issue an "unless order", O. 34 r. 2(2) of the ROC ... clearly contemplates that orders and directions issued by the court during pre-trial case management are peremptory in nature as O. 34 r. (3) of the ROC confers on the court the power to, *inter alia*, strike out a party's claim either on its own motion or upon the application of any party, in the event that such party defaults in complying with any order and/or directive issued by the court under the said O. 34 r. 2(2) ...

Warnings And 'Second Chance'

[46] Based on the foregoing discussions, this court takes the view that the same applies to the absence of warnings and 'second chance'. Absence of warnings or 'second chance' does not circumvent a court's judicial discretion under O. 34 r. 2(3) of the Rules of Court 2012 to strike out a party's claim for non-compliance with pre-trial case management directions under O. 34 r. 2(2)(l) and (m).

Issue 3: Whether The Absence Of An Application For Dismissal By The Respondent Circumvents The Learned Sessions Court Judge's Ability To Exercise His Discretion Under Order 34 Rule 2(3) Of The Rules Of Court 2012?

[47] The appellant argued that the judicial discretion under O. 34 r. 2(3) of the Rules of Court 2012 cannot be exercised because the respondent had never formally made an application under O. 34 r. 2(3) of the Rules of Court 2012 to strike out the appellant's claim.

[48] This court rejects the appellant's argument in this regard and agrees with the respondent's position as O. 34 r. 2(3) of the Rules of Court 2012 explicitly stipulates that a court can exercise such discretion at its own motion. The relevant provision reads as follows:

> The court, having given directions under rule 2(2) or rule 3 **may either on its own motion** or upon the application of any party, if any party defaults in complying with any such directions, dismiss such action or proceedings or strike out the defence or counterclaim or enter judgment or make such order as it thinks fit.
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> (emphasis added)

Issue 4: Whether It Was Appropriate For The Learned Sessions Court Judge To Exercise His Discretion Under Order 34 Rule 2(3) Of The Rules Of Court 2012 To Strike Out The Appellant's Claim?

[49] In considering the appropriateness of the learned Sessions Court Judge's decision to exercise his discretion under O. 34 r. 2(3) of the Rules of Court 2012 to strike out the appellant's claim for non-compliance with the pre-trial case management directions (which was made pursuant to O. 34 r. 2(2)(l) and (m) of the Rules of Court 2012), reference may be made to *How Hock Sing*. In that case, the High Court outlined the legal position in the following terms:

> [28] ... in determining whether the consequence of dismissal of the action under O. 34 r. 2(3) is justified ... each case must be decided on its own facts.

[50] *How Hock Sing* included the following as the "key considerations" that are to be taken into account whilst assessing the appropriateness of exercising the judicial discretion under O. 34 r. 2(3) of the Rules of Court 2012:

(i) whether the failure to comply was intentional and contumelious;

(ii) whether there is a history of failure to comply with other orders;

(iii) whether the (applicant) contributed to the failure by the (respondent);

(iv) whether the (respondent) had made positive efforts to comply but was prevented from doing so by extraneous circumstances;

(v) whether there is prejudice to the non-defaulting party; and

(vi) whether the dismissal is proportionate to the failure to comply.

[51] This court in *Muhammad Ammar* had said that given that the assessment of appropriateness in exercising the discretion under O. 34 r. 2(3) of the Rules of Court 2012 requires a holistic factual assessment, this court is of the considered view that the "key considerations" mentioned in *How Hock Sing* are not exhaustive. Other pertinent factors could also be considered by the courts.

Delay

[52] In the present appeal, as the issue of delay was extensively argued by the parties, the question as to whether the delay was severe enough to justify the invocation of O. 34 r. 2(3) of the Rules of Court 2012 is apt.

[53] It may be recalled that the appellant had argued that when the order under O. 34 r. 2(3) of the Rules of Court 2012 was made, the learned Sessions Court Judge had yet to fix the trial dates. This, as the appellant argued, indicated that the delay was not significant enough to justify the invocation of O. 34 r. 2(3) of the Rules of Court 2012 as the delay did not in any way hinder the trial proceedings.

[54] This court considers the following observations by the Court of Appeal in *Dr Sim Kui Hian v. Chong Chieng Jen & Other Appeals* [2021] 6 CLJ 305; [2021] 4 AMR 313; [2021] MLJU 562; [2021] 4 MLRA 348 as germane.

> [34] ... we are of the view that unless the nature of the non-compliance is sufficiently serious to defeat the purpose of the case management directions, the drastic action of dismissing the action without warning should not be resorted to. The purpose of pre-trial case management directions is to "secure the just, expeditious and economic disposal of the action or proceedings" (see Order 34 rule 2(2) of Rules of Court 2012). In the instant case, by all accounts including that of counsel for the defendant as we noted earlier, the trial schedule was not disrupted despite the delay in the filing of the Bundle of Documents by the plaintiff. Therefore, the dismissal of the suit merely because the explanation for the delay was unbelievable cannot be reconciled with the main purpose of the case management regime provided in Order 34 of the Rules of Court 2012 that we adverted to earlier.
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> [35] For avoidance of doubt, we hasten to add that we are no in way condoning the delay in complying with the court's case management directions on the part of Mr. Shankar Ram. However, given the fact that the non-compliance in question cannot be construed as amounting to total disregard of directions that affected the conduct of the trial or derailed the trial that was still on track at that time, the avenue of penalising the plaintiff under Order 59 rule 8(b) Rules of Court 2012 at the end of the trial with a costs order to show the court's disapproval would have been more appropriate. The said rule enacts that the court in exercising its discretion as to costs shall in appropriate circumstances consider, among others, "the conduct of all the parties, including conduct before and during the proceedings". It would have been otherwise if the Bundle of Documents and Bundle of Pleadings were not filed at all or other directions were ignored despite the looming trial date.

[55] In the above case, the Court of Appeal had allowed the appeal and the order under O. 34 r. 2(3) of the Rules of Court 2012 was set aside, even though trial dates had been fixed. In the present appeal, no trial dates have been fixed by the Sessions Court.

[56] This court is of the view that the reason provided by the appellant (the difficulty in contacting the witness as the witness has retired) for the non-compliance was likely a valid and acceptable reason. Hence, the delay cannot be "construed as amounting to total disregard of directions that affected the conduct of the trial or derailed the trial". The fact that other documents had been filed by the appellant, further strengthens the appellant's case in this appeal.

"First non-compliance" – Absence Of History Of Non-Compliance

[57] The decision of this court to allow this appeal is further reinforced by the findings that this was a first non-compliance on the part of the appellant. The case of *Ho Woon Kong & Ors v. Potensi Mestika Construction Sdn Bhd & Anor* [2024] CLJU 338; [2024] MLJU 401; [2024] MLRHU 277 ("*Ho Woon Kong*") can be distinguished from the present appeal. In that case, the appellants/plaintiffs had breached two unless orders to produce their witness statement and despite being given multiple opportunities the appellants/plaintiff could not show any evidence that the said witness could not attend trial. In other words, there were flagrant non-compliances with the Sessions Court's directions.

[58] Additionally, in *Ho Woon Kong*, during the appeal in the High Court, the appellants/plaintiffs had even filed their appeal records out of time, and post-filing, the High Court found that the record papers were absent from the records. Moreover, the records were such that there were "many typographical errors" and that "the Session Court's grounds of judgment are not arranged chronologically" (see para. [2] of *Ho Woon Kong*'s judgment). All in all, starting from the first instance to the appeal before the High Court, there were numerous instances of flagrant non-compliances.

Merits Of The Appellant's Claim

[59] Furthermore, the appellant has rightfully highlighted that one key consideration that the court should take into account is that the merits of the appellant's claim was not heard by the learned Sessions Court Judge. This court is mindful of the courts' "objective" or aspiration that disputes should naturally be disposed on the merits. This is underscored by the Court of Appeal in *Hatara (M) Sdn Bhd v. Petroliam Nasional Bhd & Anor* [2010] 3 CLJ 550; [2010] 4 MLJ 17; [2010] 1 MLRA 68 where it was held that:

> [11] It must be noted that the plaintiff's case was struck out and not dismissed. There is a distinction between striking out and dismissing a case. In *Tee Ha Leong v. Messrs Low & Lim & Anor* [2005] 4 MLJ 426 James Foong J (as he then was) said at p. 432:
>
> > [27] Having considered the above authorities, which are all made – by courts of concurrent jurisdiction, I am of the view that there is a distinction between striking out and dismissing a case. If the case if struck out then O. 35 r. 2(1) of the RHC can be utilised to

> apply for reinstatement. But when the case is dismissed, as in this instance case, then the avenue open to the aggrieved party is to appeal. This is based on the rational that the case was already heard on merits.
>
> [12] It is also to be observed from the notes of proceeding on 16 April 2004 the learned judge did not hear any explanation from the plaintiff's counsel for the alleged non-compliance of the peremptory order. Counsel for the plaintiff informed the court that they were discharging themselves. The plaintiff's representative was not present. In the affidavit in support of the plaintiff's summons in chambers dated 16 July 2004 Muhammad Nur Affendi bin Mohamad Radzi, the plaintiff's managing director, stated in para 13 of his affidavit that on that day he went to Wisma Denmark and not Bangunan Sultan Abdul Samad. His counsel applied for another date for case management so that the court could hear the application by the plaintiff counsel to discharge themselves first.
>
> [13] What is also clear from the notes of proceeding is that when making the order of striking out of plaintiff's suit the learned judge did not hear the case on merits ...
>
> [20] In the affidavit-in-support the plaintiff stated that there was merit in the claim and the plaintiff was willing and able to proceed with the action. According to the plaintiff if the application for reinstatement is not allowed the plaintiff would be prejudiced because a fresh action against the defendants would be barred by the limitation period.
>
> [21] In our view, to strike out the plaintiff's suit in such circumstances would involve an error in principle in the exercise of judicial discretion and it had occasioned a substantial miscarriage of justice. We were of the view that this was a fit and proper case for interference by this court. Accordingly, we allowed the appeal and set aside the order of the learned judge and reinstated the case. With regard to costs we ordered that costs of this appeal and all costs thrown away as a result of the striking out of the plaintiff's suit be borne by the plaintiff and the deposit paid into court be paid to the defendants to account of taxed costs.

Conduct Of The Appellant's Legal Representatives

[60] The respondent alleged that the appellant adopted a nonchalant attitude in conducting the case, as evidenced by the last-minute request for an extension during the case management on 26 March 2024. This, the respondent submitted, reflected a disregard for counsel's obligation to assist the court in complying with its directions. Likewise, this court also notes that the learned Sessions Court Judge's grounds of judgment and main criticism against the appellant was that no positive efforts were made by the appellant to ensure compliance with O. 34 r. 2(2)(l) and (m) of the Rules of Court 2012.

[61] This court makes several observations in this regard. First, the respondent did refer to *Faisal Hj Siraj & Anor v. Ahmad Zaki Sdn Bhd & Ors* [2020] CLJU 105; [2020] 1 LNS 105; [2020] AMEJ 0050; [2020] MLJU

A 108; [2020] MLRHU 111, arguing that the last-minute request for extension did suggest a nonchalant attitude by the appellant's legal representatives. Considering Faisal, this court agrees with the respondent that it does give such an impression, especially since the appellant had admitted to locating the key witness who had retired one week and three days before the case
B management. The court agrees that the appellant's legal representatives should have informed the Sepang Sessions Court as early as possible rather than leaving it until the day of the case management to request an extension to file the witness statements and list of witnesses.

[62] Second, the appellant argued during its submissions that its legal
C representatives had appeared at the case management *via* e-Review at 8.55am. This court is of the view that punctuality is a basic courtesy and expectation placed on members of the Bar. Therefore, the appellant's submission regarding its legal representatives' punctuality on the day of the case management is irrelevant. The pertinent fact is the lack of seriousness
D demonstrated by its legal representative to raise the extension request earlier.

[63] Third, the appellant contended that the learned Sessions Court Judge struck out its claim under O. 34 r. 2(3) of the Rules of Court 2012 at 6.04 pm on 26 March 2024, outside office hours, and did not respond earlier to its request for an extension. The appellant argued that this gave it false hope
E and implicitly suggested that the extension sought had been granted. The appellant further argued that if the learned Sessions Court Judge disagreed with its request, he should have notified the appellant earlier, allowing it to file the completed witness statements and witness list.

[64] This court rejects the appellant's argument in this regard. First, given
F that the respondent objected to the appellant's extension request at 9.16am, and the appellant had only responded by requesting further time to file the witness statements and list at 9.41am, it could equally be construed that the learned Sessions Court Judge was under the impression that the appellant had accepted that it was non-compliant with the pre-trial case management
G directions. With no further request or direction given, the Judge may well have assumed that the appellant had known no extension was granted and it would file the witness statements and witness list on the same day as directed by the initial pre-trial case management direction. Second, since the learned Sessions Court Judge gave no specific direction, the appellant should not
H have assumed implicit acquiescence to an extension, as its legal representatives bear the onus of obtaining clear directions from the Sessions Court.

[65] Therefore, the fact that the learned Sessions Court Judge made the order at 6.04pm is relevant only insofar as determining whether the order
I was issued before the deadline for compliance had expired (as addressed in issue 1 above). However, to argue that this constituted implicit acquiescence

is unrealistic. Clearly, the conduct of the appellant's legal representatives bears some responsibility for the decision made by the learned Sessions Court Judge.

[66] Regardless of the findings of this court regarding the conduct of the appellant's counsel as discussed in paras. [60] to [65] above, after a thorough evaluation of the other key factors or considerations, this court answers the question raised in issue 4 in the negative.

[67] The appeal is allowed, and this case is to be reinstated in the Sepang Sessions Court for hearing before a different judge.

[68] The appellant is to pay costs of RM5,000 to the respondent, subject to allocatur.